85-729

No.

IN THE

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1985

WILLARD A. BRONGER, FRANK E. KACPROWICZ, AND ALBERT J. VEVERKA,

Petitioners,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MAX G. BRITTAIN, JR.
Counsel of Record
TERRILL ELISE PIERCE
CATHY A. POHL
KOVAR NELSON & BRITTAIN
500 Marquette Building
140 S. Dearborn Street
Chicago, IL 60603
(312) 346-4515
CARL H. DEBROUX
108 John Street
P.O. Box 232
North Aurora, IL 60542
Of Counsel

Counsel for Petitioners

Pandick Midwest, Inc., Chicago • 733-6000

QUESTION PRESENTED

Whether military service as an air traffic controller is creditable toward the twenty-five year service requirement for early retirement as an air traffic controller pursuant to 5 U.S.C. § 8336(e).

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PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OPINIONS BELOW

The rehearing *en banc* opinion of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in *Bronger, et. al. v. Office of Personnel Management,* 769 F.2d 756 (Fed. Cir. 1985), appears in the Appendix hereto (hereinafter *"Bronger II"*). The original opinion of the Federal Circuit in this case is found at 740 F.2d 1552 (Fed. Cir. 1984), and appears in the Appendix hereto (hereinafter *"Bronger I"*). The decisions of the Merit Systems Protection Board ("MSPB") and of the Office of Personnel Management ("OPM") with respect to each of the Petitioners are also appended hereto.

JURISDICTION

The original judgment of the Court of Appeals for the Federal Circuit was entered on July 26, 1984. A petition for rehearing *en banc* was granted and decided on August 1, 1985, and this petition for *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5:

§ 2101. Civil Service; armed forces; uniformed services

§ 2105. Employees

§ 2109. Air Traffic Controllers

§ 3307. Competitive services; maximum-age entrance requirements; exceptions

§ 8331. Definitions

§ 8332. Creditable service

§ 8333. Eligibility for annuity

§ 8336. Immediate retirement

United States Code, Title 28:

§ 1295(a)(9) Jurisdiction of the United States Court of Appeals for the Federal Circuit

The pertinent text appears in the appendix pursuant to Rule 21.1(f) of the Supreme Court Rules.

STATEMENT OF THE CASE

This case involves a dispute between Petitioners, who are former air traffic controllers, and OPM, regarding Petitioners' entitlement to early retirement benefits under the Civil Service Retirement System. Petitioners were removed by the Federal Aviation Administration ("FAA") from their positions as air traffic controllers in August 1981 as a result of the nationwide strike called by the Professional Air Traffic Controllers Organization ("PATCO").

Petitioners were informed by OPM that they were not entitled to early retirement benefits on the grounds that: 1) they lacked the appropriate number of service years; 2) they had been involuntarily separated for cause; and 3) their receipt of a lump sum refund terminated their rights in the Civil Service Retirement System.[1]

Petitioners appealed OPM's denial of their early retirement benefits to the MSPB, because each of them had more than the requisite twenty-five years of creditable service as an air traffic controller ("ATC") when military service and civilian service in said position were combined. More specifically, each of the Petitioners has served approximately twenty-three (23) years as a civilian ATC and approximately three (3) years as a military ATC. The MSPB affirmed OPM's denial of benefits on the ground that Petitioners were removed for cause.[2]

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[1] OPM later abandoned its argument that Petitioners were ineligible for early retirement because they had been removed for cause. OPM recognized that such a position was untenable since other air traffic controllers removed pursuant to the PATCO strike were given the option of early retirement. *Bronger I, supra,* 740 F.2d at 1554. OPM also abandoned its argument that Petitioners' receipt of the lump sum voided their rights to early retirement. *Id.*

[2] As noted, OPM later abandoned any reliance on this "removal for cause" argument. Accordingly, the basis for MSPB's affirmance is no longer valid.

Petitioners appealed the MSPB decisions to the Federal Circuit pursuant to 28 U.S.C. 1295(a)(9). On appeal, Petitioners argued that their military service should be creditable for purposes of early retirement benefits pursuant to 5 U.S.C. 8336(e). On July 26, 1984, a three-judge panel of the Federal Circuit decided that military service as an air traffic controller was creditable toward early retirement under the statute. *Bronger I, supra.* On August 1, 1985, the Federal Circuit agreed to rehear the case *en banc,* and issued its *Bronger II* opinion, which held that military service as an air traffic controller was not creditable toward early retirement. It is the *Bronger II* decision which Petitioners now seek to have this Court review and reverse.

REASONS FOR GRANTING WRIT

I. THE DECISION BY THE FEDERAL CIRCUIT IN *BRONGER II* IS FUNDAMENTALLY IN ERROR AND DIRECTLY CONFLICTS WITH THE *BRONGER I* DECISION

An air traffic controller's statutory entitlement to early retirement benefits after the requisite years of service in said position is an issue of critical importance to the management of this country's air traffic control system and to the safety of the public which depends on the system.

The issues concerning retirement benefits for federal employees can be heard only by the Federal Circuit. 28 U.S.C. § 1295(a)(9). The Federal Circuit has issued two opinions on the issue of whether military service as an air traffic controller is creditable toward a civilian air traffic controller's early retirement. The two opinions embody directly contrary interpretations of the same statutory provisions.

In its decision in *Bronger I,* the Federal Circuit held that 5 U.S.C. § 8336(e) entitles civilian air traffic controllers to early

retirement after twenty-five years of service in controlling air traffic, whether that service was rendered in the military or as a civilian. The court held that the statute provides benefits to individuals who are "employees", as defined in 5 U.S.C. § 2105, engaged as "air traffic controllers", defined in 5 U.S.C. § 2109(1). The statute requires twenty-five years of "service", as defined in 5 U.S.C. §§ 8331(12) and 8332(c), in air traffic control work. Since 5 U.S.C. § 8332(c) permits the crediting of military service, the court properly credited Petitioners' military service as controllers.

With no new arguments or cases to support its statutory interpretation, OPM requested that the Federal Circuit grant a rehearing *en banc*. The court agreed to do so and on rehearing completely altered its reading of the statute. The court held that the years of service requirement in 5 U.S.C. § 8336(e) relates to service in a *civilian* position with the Department of Transportation or the Department of Defense. Thus, at least for air traffic controllers, the court held that military service was not creditable toward early retirement. The court's reasoning in *Bronger II* is inexplicable.

Since only the Federal Circuit can rule on the instant issue, there can be no conflict between circuits. However, as set forth above, there is a very clear conflict among the judges of the Federal Circuit itself. Moreover, the government argued, and the Federal Circuit apparently agreed, that the case presents an issue of exceptional importance.[3] The result of this decision

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[3] Under Rule 35 of the Federal Rules of Appellate Procedure and Rule 19(a) of the Rules of the Federal Circuit, a rehearing *en banc* is deemed an "extraordinary procedure" to be granted only when the original decision conflicts with precedent or presents a question of "exceptional importance". OPM cited no conflicting precedent, but rather contended that the issue was a precedent-setting question of exceptional importance. The Federal Circuit obviously agreed. Petitioners submit that this is the very reason the issue should be heard by this Court.

affects not only present Petitioners, but all air traffic controllers and their rights under the Civil Service Retirement System.

This direct conflict within the Federal Circuit concerning the interpretation of an important federal statute justifies the grant of *certiorari* to review the judgment below. *See, John Hancock Ins. Co. v. Bartels,* 308 U.S. 180, 181 (1939) ("Because of conflict in the Court of Appeals of the Fifth Circuit, due to the differing views of the judges composing the court in the cases cited, and because of the importance of the question, we granted *certiorari.*" (footnote omitted)) Therefore, Petitioners request that the Court grant *certiorari* on the issue presented here.

II. THE DECISION BELOW RAISES AN IMPORTANT FEDERAL QUESTION AS IT RELATES TO ENTITLEMENTS OF FEDERAL EMPLOYEES AND THE PUBLIC INTEREST IN AVIATION SAFETY

The decision below raises important issues concerning the statutory construction of a federal law, which affects not only past and future air traffic controllers, but the public at large.

The two opinions rendered to date raise serious statutory considerations which should be settled by this Court. Petitioners' entitlement to benefits is based on the statutory definition of "service". 5 U.S.C. § 8332(c). The definition of "service" is a cornerstone of the civil service retirement program. The holding in *Bronger II* creates exceptions to what constitutes "service" which simply do not appear in the statute.

Furthermore, the holding is contrary to the legislative history of the statute and vitiates the Congressional intent in creating it. The issue of an air traffic controllers' eligibility for early retirement benefits directly affects the public safety and therefore the statute must be carefully examined with the legislative intent in mind.

The law, as amended in 1972, subjected air traffic controllers to a maximum entry age and a mandatory retirement age of 56, and simplified the normal civil service procedures for removing an individual from his job. S. Rep. No. 92-774, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. Code Cong. & Adm. News 2287, *generally*. Air traffic controllers were thus deprived of many of the employment protections granted to civil service employees in general. In return, Congress invested in retraining opportunities for controllers and an early retirement program it hoped would encourage controllers to leave the service voluntarily before their skills began to decline. *Id.*

The 1972 law represented a comprehensive plan "to promote aviation safety and provide for the efficient control of air traffic by extending early benefits and management flexibility needed to recognize the extreme pressures and stress of air traffic control work". S. Rep. No. 96-902, 96th Cong., 2d Sess. 1-2, *reprinted in* 1980 U.S. Code Cong. & Adm. News 2714. Undoubtedly service as a military air traffic controller is just as taxing on an individual as that same service rendered as a civilian air traffic controller. If military service is not credited, the intent of Congres "to discourage the use of older personnel in controller positions and to give the controller assurance of eventual relief from a long span of control work" is extirpated. S. Rep. No. 92-774, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. Code Cong. & Adm. News 2287, 2294-95.

In the course of granting special early retirement benefits to air traffic controllers, it is clear that Congress was concerned with air safety for the traveling public.

> No other Government worker is so directly involved in the safety of millions of Americans, who travel by air each year, or the safety of many millions of dollars of aviation equipment used to transport the public.

S. Rep. No. 92-774, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. Code Cong. & Adm. News 2287, 2289. Congress was

seeking to provide protection for the public, not just an extra benefit to workers:

> Like skilled atheletes, most controllers lose proficiency to some degree after 40, and in the interest of the public's safety, should not be retained as controllers beyond the time they can perform satisfactorily. Under existing law, there is little that can be done to alleviate this problem.

S. Rep. No. 92-774, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. Code Cong. & Adm. News 2287, 2288.

The statute itself, and the legislative history applicable thereto, amply support the court's holding in *Bronger I* that military service as an air traffic controller should be credited for purposes of early retirement. The magnitude of these concerns clearly demonstrate that the proper interpretation of this federal statute as it relates to air traffic controllers constitutes an important question of federal law which should be settled by this Court.

CONCLUSION

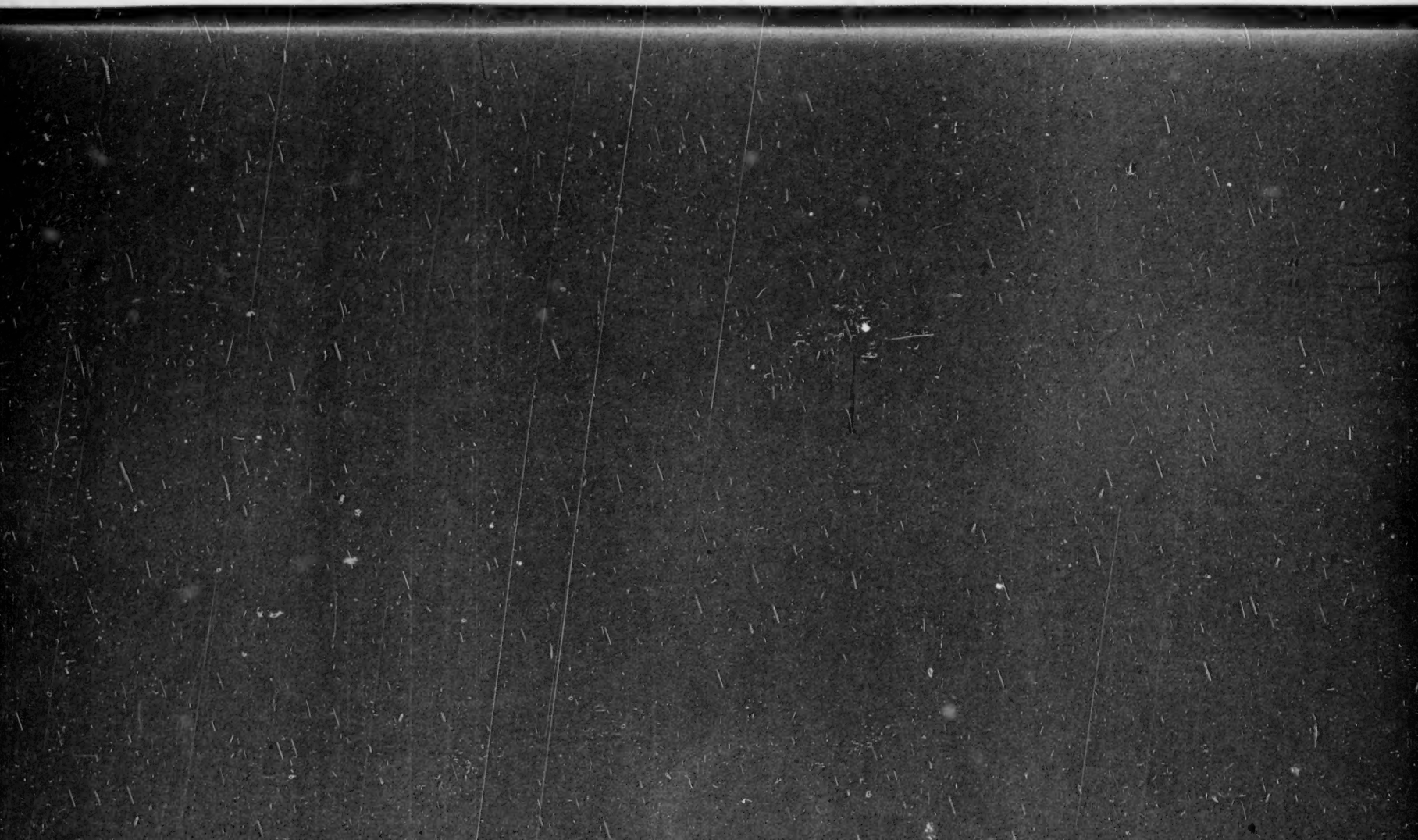
For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the Federal Circuit in *Bronger II*.

Respectfully submitted,

MAX G. BRITTAIN, JR.
Counsel of Record
TERRILL ELISE PIERCE
CATHY A. POHL
KOVAR NELSON & BRITTAIN
500 Marquette Building
140 S. Dearborn Street
Chicago, IL 60603
(312) 346-4515
CARL H. DEBROUX
108 John Street
P.O. Box 232
North Aurora, IL 60542
Of Counsel

Counsel for Petitioners

APPENDIX



UNITED STATES COURT OF APPEALS

For the Federal Circuit

WILLARD A. BRONGER,

Petitioner,

v. Appeal No. 83-1349

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

FRANK E. KACPROWICZ,

Petitioner,

v. Appeal No. 83-1350

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ALBERT J. VEVERKA,

Petitioner,

v. Appeal No. 83-1376

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Carl H. DeBroux, of N. Aurora, Illinois, argued for petitioners.

Helene M. Goldberg, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for respondent. With her on the brief were *Richard K. Willard,* Acting Assistant Attorney General, *David M. Cohen,* Director, *Mary Mitchelson* and *Thomas W. Petersen.*

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Appealed from: Merit Systems Protection Board

UNITED STATES COURT OF APPEALS

For The Federal Circuit

WILLARD A. BRONGER, *Petitioner,* v. OFFICE OF PERSONNEL MANAGEMENT, *Respondent.*	Appeal No. 83-1349
FRANK E. KACPROWICZ, *Petitioner,* v. OFFICE OF PERSONNEL MANAGEMENT, *Respondent.*	Appeal No. 83-1350
ALBERT J. VEVERKA, *Petitioner,* v. OFFICE OF PERSONNEL MANAGEMENT, *Respondent.*	Appeal No. 83-1376 ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

DECIDED: August 1, 1985

Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, DAVIS, BALDWIN, KASHIWA and BENNETT, *Circuit Judges,* MILLER,* *Senior Circuit Judge,* and SMITH, NIES, NEWMAN and BISSELL, *Circuit Judges.*

NIES, *Circuit Judge.*

These consolidated appeals are from a decision of the Merit Systems Protection Board (MSPB) upholding the denial by the Office of Personnel Management (OPM) of petitioner's early retirement claims under 5 U.S.C. § 8336(e) (1976). The

* Judge Miller assumed senior status effective June 6, 1985.

appeals were originally decided by a three-judge panel which, by a two-to-one majority, reversed the decision of the MSPB. 740 F.2d 1552 (Fed. Cir. 1984). The government filed a petition for rehearing and a suggestion for rehearing in banc, which was stayed pending the outcome of the Supreme Court's review of *Lindahl* v. *Office of Personnel Management,* 718 F.2d 391 (Fed. Cir. 1983) (in banc), involving a question of the subject matter jurisdiction of this court which was pertinent to these appeals. The stay was vacated, and the court voted to review the merits of these appeals in banc, upon the issuance of *Lindahl* v. *Office of Personnel Management,* 105 S. Ct. 1620 (1985), in which the Supreme Court held that an appeal from the decision of the MSPB on certain aspects of a civil service retirement claim could be taken directly to this court. These appeals present an issue of statutory interpretation, which is one type of issue held to be within the jurisdiction of this court under 28 U.S.C. § 1295(a)(9) and 5 U.S.C. § 7703(b)(1). *Id.* at 1633.

Specifically, the issue is whether, under 5 U.S.C. § 8336(e), petitioners' time in the military in assignments having air traffic control duties is creditable as "years of service" toward early retirement from a civilian position as an air traffic controller. Having considered the positions of the parties and the panel decision, the court, in banc, holds that OPM properly refused to credit petitioners' military service in calculating their eligibility under § 8336(e) for early retirement. Accordingly, we affirm the denial of petitioners' claims.

Background

On August 3, 1981, the Professional Air Traffic Controllers Organization (PATCO) called a nationwide strike of air traffic controllers employed by the Department of Transportation, Federal Aviation Administration (FAA). The FAA responded by taking appropriate steps to remove those controllers believed

to be strike participants.[1] However, controllers who were eligible for retirement at that time were given the option of voluntarily retiring, thereby avoiding disciplinary proceedings. Because the FAA considered the petitioners in these appeals to be ineligible for retirement by reason of an insufficient number of years of service, the option of retirement was foreclosed to them by FAA, and petitioners were removed from their positions in adverse action proceedings. Petitioners subsequently requested and received lump-sum distributions of their respective retirement contributions.

After removal, petitioners applied to the Office of Personnel Management (OPM) for early retirement benefits under 5 U.S.C. § 8336(e) (1976) which provides:

> (e) An employee who is voluntarily or involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity.

At the time the claims for annuities were filed, each petitioner was under 50 years old and had approximately 23 years of service in a civilian position as an FAA air traffic controller. In addition, prior to employment at the FAA, each petitioner had served approximately three years in the military, presumably as an "air traffic controller."[2]

OPM denied the claimed benefits on the grounds that petitioners: (1) did not meet the minimum "years of service"

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[1] See *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir. 1984) for a discussion of the events surrounding the strike and the removal of FAA air traffic controllers.

[2] Petitioners' discharge papers designate their specialties by number and/or title. For example, Bronger's reads "27250 - Air Route & Appr Control Opr."

requirement, and (2) had been separated for cause. Petitioners sought review before the MSPB, which affirmed OPM's decision on the ground that petitioners were ineligible under § 8336(e) because they had been removed "for cause." On appeal to this court, however, OPM concedes that refusal on the ground that petitioners were removed for cause would result in disparate treatment of petitioners vis-a-vis other controllers who were given the option of retirement. Accordingly, OPM now relies solely on its alternative position, i.e., that petitioners' military service does not count as "years of service" toward *early* retirement from a civilian air traffic controller position.

Analysis

The pertinent statute, 5 U.S.C. § 8336(e), quoted *supra*, provides, *inter alia*, for early retirement benefits to an employee under 50 years of age upon completion of "25 years of service as an air traffic controller." The term "air traffic controller" is defined in 5 U.S.C. § 2109(1) (Supp. IV 1980) to mean "an employee of the Department of Transportation or the Department of Defense who . . . is actively engaged in the separation and control of air traffic . . . "; "employee" is defined in 5 U.S.C. § 2105(a) (1976) to mean an individual "appointed in the *civil service*"; and "civil service" is defined in 5 U.S.C. § 2101 (1976) to exclude "uniformed services," i.e., military service. Thus, under a literal reading of the statute, the years of service requirement in § 8336(e) relates to service in a *civilian* position with the Department of Transportation or the Department of Defense.[3] There is no military position that meets the requirements for "service as an air traffic controller" under the statute.

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[3] The conclusion that the statute means *civilian* service makes petitioners' remaining arguments comparable to those rejected in *Tirado* v. *Department of the Treasury*, 757 F.2d 263 (Fed. Cir. 1985) (military service does not count towards disability retirement under 5 U.S.C. § 8337(a) (1982), which requires five years of *civilian* service).

The petitioners, nevertheless, assert that military service involving air traffic control duties should be credited in view of 5 U.S.C. § 8331(12) (1976), which provides that "service means employment creditable under § 8332." 5 U.S.C. § 8332(c) (1976) provides, in pertinent part:

> (c) Except as provided by subsection (d) of this section, an employee or Member shall be allowed credit for periods of military service before the date of the separation on which title to annuity is based.

Originally petitioners asserted that the above provision required inclusion of any and all years in the military in computing years of service for early retirement under § 8332(c). However, in view of the specific limitation in § 8336(e) that early retirement is available only after "25 years service *as an air traffic controller,*" (emphasis added) this argument is clearly untenable. Petitioners now assert the position of the *Bronger* panel which devised a limitation restricting creditable military service under § 8332(c) to "military service as controllers." 740 F.2d at 1558. Regardless of the merits of this retirement plan, neither the statute itself nor the legislative history justifies such an interpretation. If Congress had intended that military service in a position comparable to civilian air traffic controller be counted as "years of service" toward early retirement, one would expect that Congress would have provided either a limitation in § 8332(c) on the type of military service to be counted or would have specified in § 8336(e) to include time in the military as an "air traffic controller" within "years of service." Congress did neither.

Similarly, the legislative history, after noting that controllers enter the civil service "often after military service," gives no indication that military service is to count in computing eligibility years for early retirement. S. Rep. No. 774, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2287, 2289.

Thus, with no conflicting provision in the statute and no expression by Congress of a contrary intent, there is no basis for

departing from the precise definitions set forth in §§ 2101, 2105(a) and 2109(1) which limit creditable years to those accumulated in a civilian position.

Analogous early retirement benefits are provided for firefighters and law enforcement officers in subsection (c)(1) of the same section that we are construing here, § 8336.[4] A person retiring from a civilian position of "law enforcement officer," who previously served in the military police, has a claim equally as valid as those of air traffic controllers. Again, the legislative history for this provision, and that of its predecessor, gives no indication that years in the military count as time in service towards early retirement. In the Federal Personnel Manual Supplement 831-1, subch. S9-3 at 28.02 (September 30, 1975), the following explanation was given with respect to crediting military service under § 8336(c)(1):

> f. Crediting of military service under the special provision. (1) The law contemplates 20 years of civilian service in a law enforcement officer or firefighter position. *Military service, even though it may have been law enforcement officer or firefighter work, may not be counted in determining the 20-year period.* However, after the minimum period has been established, military service is creditable in computing the annuity rate. [Emphasis added.]
>
> (2) Periods of military service during which the employee is on furlough from a civilian position may be counted as civilian service. Therefore, an employee serving in a law enforcement officer or firefighter position who goes on military furlough will be credited with the military furlough period in computing the 20-year minimum.

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[4] 5 U.S.C. § 8336(c)(1) (1982) reads:

> (c)(1) An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer or firefighter, or any combination of such service totaling at least 20 years, is entitled to an annuity.

The same explanation has continued to date, FPM Supp. 831-1, subch. S9-3 at 36 (Feb. 29, 1980), but with an emphasis added to the word "civilian" in the first sentence of f.(1). This interpretation was upheld by the MSPB in *Bell* v. *Office of Personnel Management,* 22 M.S.P.R. 43, 44-45 (1984):

> The record supports the agency's position that the appellant's military service as a law enforcement officer may not be credited toward the minimum service requirements of 5 U.S.C. § 8336(c)(1), and that 20 years of civilian service in that capacity are required. . . . 5 U.S.C. § 2101(1) excludes the "uniformed service" from that title's definition of the "civil service." Although a broader interpretation of the term "law enforcement officer" in 5 U.S.C. § 8336(c)(1) undoubtedly would increase the number of older employees entitled to retire under that provision, the plain language of the statutory provision cited above indicates that the Congress did not intend to extend early-retirement benefits to all law enforcement officers over the age of 50, or even to extend them to all of those employees whose military and civilian service as law enforcement officers totalled 20 years of service.

Military service by air traffic controllers, firefighters, and law enforcement officers is not unrewarded, however. Under § 8339(a), such service may increase the financial benefits that those with the requisite years of *civilian* service will receive upon early retirement. Also, such service will count *as time* towards regular retirement, e.g., as part of the 30 years of service generally required for government employees in 5 U.S.C. § 8336(a). Moreover, no special kind of military service is necessary for either benefit.

Conclusion

In sum, the statutory interpretation of § 8336(e) given by OPM has been consistent since enactment in 1972 and is also consistent with its interpretation of the parallel provision in § 8336(c). In view of the absence of conflicting or ambiguous provisions in the statute or at least some indication that

Congress intended another interpretation, this court may not depart from a literal reading of the statute. Accordingly, we *affirm* the decision of the Merit Systems Protection Board upholding OPM's denial of each petitioner's claim to early retirement benefits.

AFFIRMED

DAVIS and SMITH, *Circuit Judges,* dissent.

cc: Mr. Max G. Brittain, Jr.
Mr. David M. Cohen

WILLARD A. BRONGER, *Petitioner,*

v.

OFFICE OF PERSONNEL MANAGEMENT, *Respondent.*

FRANK E. KACPROWICZ, *Petitioner,*

v.

OFFICE OF PERSONNEL MANAGEMENT, *Respondent.*

ALBERT J. VEVERKA, *Petitioner,*

v.

OFFICE OF PERSONNEL MANAGEMENT, *Respondent.*

Appeal Nos. 83-1349, 83-1350 and 83-1376.

United States Court of Appeals,
Federal Circuit.

July 26, 1984.

Air traffic controllers who each had more than 25 years combined civilian/military experience in their jobs made request for immediate retirement annuity. The Office of Personnel Management denied requests, which denials were upheld by Merit Systems Protection Board, and controllers sought judicial review. The Court of Appeals, Edward S. Smith, Circuit Judge, held that: (1) Court had jurisdiction to review controllers' appeals from Board's decision affirming denial of their immediate retirement annuity applications, and (2) controllers' initial service as controllers in military capacity counted as creditable service toward civil service retirement, and thus, controllers were eligible to apply for immediate retirement annuities.

Reversed.

Nies, Circuit Judge, dissented and filed opinion.

1. Officers and Public Employees

Court of Appeals had jurisdiction to review air traffic controllers' appeal from Merit Systems Protection Board's decisions affirming Office of Personnel Management's denial of their applications for immediate retirement annuities. 5 U.S.C.A. § 8347(c), (d)(1).

2. Officers and Public Employees

Federal Aviation Administration air traffic controllers' initial service as controllers in military capacity for Department of Defense was to be counted in computing their total creditable service toward civil service retirement, and thus, controllers who each had more than 25 years' combined civilian/military experience were entitled to apply for immediate retirement annuities. 5 U.S.C.A. §§ 2109(1), 8336(e).

Carl H. DeBroux, North Aurora, Ill., for petitioners.

Helene M. Goldberg, Washington, D.C., for respondent; Richard K. Willard, Acting Asst. Atty. Gen., David M. Cohen, Director, Mary Mitchelson and Thomas W. Petersen, Washington, D.C., on the brief.

Before DAVIS, SMITH and NIES, Circuit Judges.

EDWARD S. SMITH, Circuit Judge.

In this consolidated appeal from the Merit Systems Protection Board (board) petitioners, air traffic controllers each with civilian/military experience in their jobs exceeding 25 years, request reversal of board decisions sustaining, in each case, denial by the Office of Personnel Management (OPM) of each of their requests for an immediate retirement annuity. We first address and reject OPM's contention that this court lacks jurisdiction over this appeal, and then reverse the board's decisions for the reason stated below.

Background

Each of these three petitioners has worked more than 25 years as an air traffic controller. In each case, however, less than 25 of these years (approximately 23) were in a civilian capacity as an employee of the Department of Transportation's Federal Aviation Administration (FAA). Approximately 3 additional years (at the beginning of each petitioner's career) were in a military capacity, as controllers licensed by the FAA's predecessor agency, and employed by the Department of Defense.

The Professional Air Traffic Controllers Organization called an illegal[1] nationwide strike on August 3, 1981. The FAA proposed removal of nearly all of those controllers, including petitioners, absent from their jobs between August 3 and 5, 1981, on the basis of absence without leave and strike participation. Shortly after this time the FAA called in petitioners to discuss whether they were eligible for immediate retirement in lieu of removal. The FAA and OPM advised petitioners, all of whom were under age 50, that they were not eligible for immediate retirement annuities because they each lacked 25 years of creditable service as required by 5 U.S.C. § 8336(e) (1982).[2] The FAA/OPM position was that petition-

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[1] Section 7311(3) of 5 U.S.C. (1982) prohibits participation in a strike against the Government. *See Schapansky v. Department of Transp.*, 735 F.2d 477 (Fed.Cir.1984), and companion air controller cases decided by this court on the same day.

[2] All section references are to title 5, U.S.C., except where otherwise indicated. Section 8336(e) states:

> "(e) An employee who is voluntarily or involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity."

ers' time as military air traffic controllers did not count as service creditable toward civil service retirement. Accordingly, petitioners exercised another option; they requested and received from OPM 1-time lump-sum distributions of their retirement contributions, totaling about $30,000 in each case. Receipt of this cash would normally result, under section 8342(a), in petitioners forfeiting any right to a retirement annuity.

After being removed and receiving their retirement refunds, petitioners realized that other air controllers whose service included over 25 years' time as civilian controllers, had successfully opted for immediate retirement. Petitioners decided to file for such retirement, despite their cash refund requests. OPM denied their requests, both initially and upon reconsideration, on the grounds that their receipt of the lump-sum refunds terminated their rights in the civil service retirement system pursuant to section 8342(a). OPM also took the position that, in any event, petitioners would not have been eligible for immediate retirement annuities because they were involuntarily separated from the FAA "for cause"—*i.e.*, absence without leave and strike participation—and hence ineligible under section 8336(e) for immediate retirement.

Petitioners appealed the OPM denials to the board, which, by separate opinions dated May 31, 1983, affirmed on the grounds that petitioners were ineligible because they were removed "for cause" under section 8336(e). On appeal to this court, OPM has abandoned the rationale for which the board affirmed and instead presses only the argument, aside from the initial issue of our jurisdiction, that petitioners' military time does not count in determining their creditable service for immediate retirement.[3] We therefore address only these two issues.

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[3] OPM has conceded that, if this court takes jurisdiction and finds that the military time constitutes creditable service,

(Footnote continued on following page.)

Opinion

1. *This Court's Jurisdiction*

[1] In *Lindahl v. OPM,*[4] this court decided in the negative a very specific jurisdictional issue:[5]

> We decide here only the question of our jurisdiction to hear the type of appeal before us, i.e., an appeal from an MSPB decision affirming the denial of a claim for annuity following a *voluntary physical disability* retirement, a decision reached by MSPB under the authority provided it in § 8347(d)(1). In such cases, the initial decision is that of the employee who has elected to retire, *and who has asserted disability as the reason,* and who has then sought an annuity. [Emphasis supplied.]

In the case before us, while petitioners have elected to retire and are seeking an annuity, they have not asserted as their reason a physical disability. This case therefore differs from, and is not controlled by, *Lindahl.* In particular, we note that the statutory lynchpin of *Lindahl,* the section 8347(c) "finality clause" which we held to bar judicial review in that case, applies only to "questions of disability and dependency arising under this subchapter [civil service retirement]."[6]

(Footnote continued from preceding page.)

then petitioners are entitled to apply to OPM for immediate retirement. Such an application, to be successful, would require petitioners to refund their lump-sum distributions. The issue concerning military time was raised before the board, but the presiding official based her decision on the § 8336(e) "for cause" exception.

[4] *Lindahl v. OPM,* 718 F.2d 391 (Fed.Cir.1983), *cert. granted,* ____ U.S. ____, 104 S.Ct. 3533, 82 L.Ed.2d 838 (1984).

[5] *Id.* at 393.

[6] Section 8347(c). *See also Lindahl,* 718 F.2d at 392-95, beginning with heading, "*Judicial Review is Precluded by 5 U.S.C. § 8347(c),*" for detailed discussion of the "finality clause." We note also that the finality words of § 8347(c)—"final and conclusive and * * * not subject to re-

(Footnote continued on following page.)

Recognizing that the *Lindahl* rationale does not expressly govern jurisdiction here, OPM advances an alternative argument which the court in *Lindahl* found unnecessary to address.[7] OPM contends that this court may not review petitioners' appeals because none of petitioners is an "employee or applicant for employment" as required by section 7703(a), providing for judicial review of board decisions. OPM points out that section 7701(a), providing for appeals to the board, is likewise limited to an "employee, or applicant for employment." By contrast, OPM argues that section 8347(d)(1), providing for civil service retirement appeals to the board, covers "individual[s]," a class of people broader than "employee[s]." Petitioners fall outside the "employee" class, according to OPM, since they were former employees when they applied for retirement. Moreover, OPM cites the lack of mention in the legislative history of the Civil Service Reform Act (CSRA)[8] of judicial review of civil service retirement cases. Instead, the CSRA focuses on judicial review of adverse, disciplinary action taken by an agency against an employee.

OPM's position borders on the frivolous when analyzed from either of two perspectives. First, beginning from the "bottom up," as we did in *Lindahl,* we set out the precise language of section 8347(d)(1):

> (d)(1) Subject to paragraph (2) [concerning mental disability] of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter [concerning civil service retirement] may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(Footnote continued from preceding page.)

view"—concern only "these matters," the antecedent for which is "questions of disability and dependency."

[7] *Lindahl,* 718 F.2d at 392.

[8] Pub.L. No. 95-454, 91 Stat. 1111. *See* 1978 U.S.CODE CONG. & AD.NEWS 2723 *et seq.* for legislative history.

This provision makes it clear that an individual such as any of petitioners whose rights or interests have been affected by an OPM action or order concerning retirement, may appeal at least to the board. Subsection (d) of section 8347 also includes (d)(2) concerning mental disability, which provision *explicitly* authorizes an "individual" to appeal to the board under section 7701 and to the court under section 7703. The fact that Congress took extra pains to clarify the avenue of review in the sensitive area of mental disability when it added subsection (d)(2) only bolsters the conclusion that Congress intended such review as well for the subsection (d)(1) nonphysical-disability retirement cases (*i.e.*, those not precluded from review by section 8347(c)). We as much stated in *Lindahl:*[9]

> In § 8347(d)(2) Congress not only allowed but legitimized judicial review in the type of case in which our predecessor court had said it was appropriate, while simultaneously reenacting the express review preclusion in § 8347(c) and *making plain that §§ 8347(d)(1) and (d)(2) were exceptions to that preclusion.* [Emphasis supplied.]

If any doubt remained whether a nonphysical-disability retirement claim appealable to the board under section 8347(d)(1) were in turn appealable to this court, that doubt should be resolved in favor of the presumption of judicial review over agency action.[10] The express preclusion to judicial review set forth in section 8347(c) applies only, as we have discussed above, to "questions of disability and dependency."

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[9] *Lindahl,* 718 F.2d at 399. *See also id.* at 399-400 discussing the subsection (d)(2) "1980 Amendment," and note 6 *supra* concerning the finality clause.

[10] *See Lindahl,* 718 F.2d at 396-97 and Supreme Court cases cited therein. *See also Lindahl* at 399 wherein we again noted the narrowness of our holding: "We need not, and hence do not, decide in this case whether *all* decisions of MSPB under § 8347(d)(1) are denied judicial review by § 8347(c)." (Emphasis supplied.)

Since our "bottom up" analysis leads us to conclude, with the help of *Lindahl,* that jurisdiction attaches here, we engage in a "top down" analysis to see if the same conclusion holds. Congress has granted this court "exclusive jurisdiction" over "an appeal from a final order or final decision" of the board pursuant to section 7703(b)(1).[11] Section 7703(b)(1) provides that "a petition to review a final order or final decision of the Board shall be filed" in this court. Section 7703(a)(1) states who may file such a petition: "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision" of the board.[12] We now address OPM's argument that petitioners are not "employee[s] or applicant[s] for employment" eligible to appeal here.

As OPM admits, "employee" as used in section 7703 is not defined there or in chapter 77 of title 5. The subchapter on civil service retirement includes a definition for purposes of that subchapter at section 8331(1)(A), which refers to the general "employee" definition at section 2105. The relevant part of that definition, section 2105(a)(1)(D), covers "an individual who is—(1) appointed in the civil service by * * * (D) an individual who is an employee under this section." The records before us show that the FAA removed petitioners in September 1981, and that in each case petitioners applied for their lump-sum retirement distributions shortly thereafter,[13] in accordance with the then-applicable provisions of section 8342(a). It would be illogical to conclude that, because petitioners had been effectively removed in September 1981, they immediately

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[11] 28 U.S.C. § 1295(a)(9) (1982).

[12] Section 7701(a), providing for appeals to the board, also refers to "[a]n employee, or applicant for employment." However, as our "bottom up" analysis makes clear, a person appealing a nonphysical-disability, non-mental-disability retirement claim to the board does so under § 8347(d)(1).

[13] The records show the effective dates of Bronger's, Kacprowicz's, and Veverka's removals to have been, respectively, September 15, 2, and 9, 1981, while the dates on which they filed for lump-sum distributions were September 22, October 5, and October 13, 1981.

entered a "nonemployee" twilight zone. If this interpretation were to prevail, then no employee who was separated from the service would be eligible to apply for lump-sum benefits under section 8342(a), since that provision specifically refers to an "employee".[14] Even more absurdly OPM's position would deprive this court of jurisdiction under section 7703 of the many civil service removal petitions brought by terminated federal employees, which we review every day.

In short, OPM's restrictive "employee" argument would likely strip this court of jurisdiction over most board decisions in the civil service retirement area. Not only in this position contrary to our suggestion in *Lindahl,* as discussed in our "bottom up" analysis *supra,* but it is contrary to OPM's legislative history argument when applied to the facts of this case. OPM contends that the CSRA legislative history is devoid of reference to retirement appeals, while replete with reference to taking disciplinary or adverse actions against federal employees. If so, the records before us clearly demonstrate an adverse or disciplinary action against each of petitioners: both OPM and the board relied at least in part on petitioners having been involuntarily removed "for cause"—*i.e.,* disciplined for absence without leave and strike participation—as a basis for denying

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[14] Indeed § 8342(a)(1)(A) as currently in force *requires* that an employee be "separated from the service for at least thirty-one consecutive days" before becoming entitled to be paid the lump-sum credit. Pub.L. No. 97-253, 96 Stat. 794, Sept. 8, 1982. Section 8342(a) as in effect when petitioners applied for the lump-sum refunds similarly referred to an "employee * * * who is separated from the service." In *Ellis v. United States,* 610 F.2d 760, 761 (Ct.Cl.1979), our predecessor court rejected a somewhat similar "cart before the horse" argument by the Government in determining whether Ellis was a statutory "firefighter" for purposes of retirement benefits. *See also Baker v. United States,* 614 F.2d 263, 271 (Ct.Cl.1980), in which our predecessor court held that a person who was still a Government employee would have no claim for annuity retirement credits until he retired from Government service.

them immediate retirement under section 8336(e). Thus the adverse action is, by the terms of section 8336(e), inextricably bound up with each of the retirement claims before us.[15] We hold that this court possesses jurisdiction to review petitioners' appeal from the board decisions affirming OPM's denial of their applications for immediate retirement annuities.

2. *The Military Service*

[2] Petitioners contend that the FAA and OPM wrongly advised them that their military time as air traffic controllers did not count toward the 25 years of air controller service required under section 8336(e) for immediate retirement. In support of their argument that the military time does count, petitioners cite the definition of "air traffic controller" in section 2109(1):

> For the purpose of this title [title 5]—
>
> (1) "air traffic controller" or "controller" means an employee of the Department of Transportation or the Department of Defense * * *[.]

OPM counters that this definition, which on its face supports petitioners' position, does not mean what it says. OPM cites the legislative history of this provision, wherein Congress repeatedly stated its intent that the controllers in the Department of Defense which it meant that section 2109(1) would cover were *civilian* controllers only—a very small subgroup.[16] Since petitioners' early service was, in each case, as a

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[15] As mentioned in note 3, *supra*, however, OPM concedes this point if we hold adversely to OPM on the two issues appealed to us. In other words, OPM is admitting that, if indeed the military time counts, then petitioners should have been permitted to apply for immediate retirement in lieu of removal.

[16] In 1980 Congress amended § 2109(1) to add the Department of the Defense. Pub.L. No. 96-347, 94 Stat. 1150.

(Footnote continued on following page.)

military controller, this would seem to exclude petitioners' military time. OPM also cross-references the definition of "employee" set forth in section 2105(a)(1) as one who is "appointed in the *civil* service." (Emphasis supplied.)

While OPM's contentions are well taken, they are not dispositive. In addition to examining closely the definition of "air traffic controller," as we have just done, it is equally if not more important that we focus on the meaning of "service." The issue of what counts as creditable service is, after all, what is disputed here. We know that petitioners were civilian "air traffic controllers" eligible for some type of civil service retirement benefits when they so applied in 1981.

At the beginning of the subchapter dealing with civil service retirement, section 8331(12) defines "service" as "employment creditable under section 8332 of this title." That section, entitled "Creditable service," states in pertinent part:

> (c)(1) * * *
>
> (A) the service of an individual who first becomes an employee * * * before October 1, 1982, shall include credit for each period of military service performed before the date of the separation on which the entitlement to an annuity under this subchapter is based * * *[.]

(Footnote continued from preceding page.)

The purpose of the amendment was to extend early retirement benefits "to *civilian* air traffic controllers working for the Department of Defense," a small group of some 320 controllers, as opposed to the 20,000 working for the Department of Transportation. S.REP. NO. 902, 96th Cong., 2d Sess. 1-2, *reprinted in* 1980 U.S.CODE CONG. & AD.NEWS 2714 (emphasis supplied). *See also* the legislative history of the original 1972 law providing early retirement benefits for controllers, wherein Congress stated that it considered including civilian Department of Defense controllers, but decided not to. Pub.L. No. 92-297, 86 Stat. 141, S.REP. NO. 774, 92d Cong., 2d Sess., at 3-4, *reprinted in* 1972 U.S.CODE CONG. & AD.NEWS 2287 at 2289-91.

If the employee is awarded retirement pay based on his military service, however, section 8332(c)(2) provides that this military service may not be, in effect, counted twice by applying to civil service retirement as well. This does not apply to petitioners, who have not applied separately for military retirement pay based on their few years of military service. We note also that section 8331(13) defines "military service" as "honorable active service," about which there is no dispute as regards petitioners.

Taking these statutory provisions together, we have, on the one hand, a definition of "air traffic controller" which appears to exclude military controllers, and, on the other hand, a definition of "creditable service" which includes military service in computation of civil service retirement benefits. The latter definition applies to the service of an "employee" which, in each of petitioners' cases, is specifically modified by the definition for "air traffic controller."

Though seemingly circular, the relationships of these provisions do not, in our view, conflict. Rather, they harmonize. One first asks, who, under section 8336(e), is eligible for immediate retirement? Answer: an "employee," specifically modified here to encompass only an "air traffic controller," as provided in sections 8331(1)(A), 2105(a), and 2109(1). Second, one asks, how, under section 8336(e), is the "service" of an air traffic controller to be computed? Answer: by reference to the definitions of "service" in sections 8331(12) and 8332(c), which credit military service. This statutory analysis compels us to hold, on the facts of each of petitioners' cases, that their military service as controllers counts in computing their total creditable service, such that each petitioner's creditable service exceeds 25 years. Accordingly, each petitioner, having been wrongly advised by the FAA and OPM initially, is eligible, as OPM has conceded, to apply for immediate retire-

ment benefits.[17] The decision of the board is reversed. We do not need to reach petitioners' secondary argument of disparate treatment.

REVERSED.

NIES, Circuit Judge, dissenting.

This is the first opinion of this court to declare that this court has jurisdiction over decisions of the MSPB under 5 U.S.C. § 8347(d)(1). I dissent. I also urge that the government request review of this decision by the Supreme Court in conjunction with *Lindahl v. Office of Personnel Management,* 718 F.2d 391 (Fed.Cir.1983), the Supreme Court having granted a petition for certiorari in the latter case on June 18, 1984.

The jurisdiction of this court over appeals of MSPB decisions is found in 28 U.S.C. § 1295(a)(9):

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—
>
> * * * * *
>
> (9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5.

In *Lindahl,* in which both members of the majority of this panel dissented, this court held *in banc* that claims under § 8347(d)(1) did not fall within § 7703. Specifically, the court held:

> To hold that judicial review of all § 8347(d)(1) decisions had all along been available under § 7703, would be to render superfluous Congress' action in § 8347(d)(2),

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[17] *See* notes 3 and 15, *supra.* The "for cause" rationale upon which the board based its decision is now moot, since OPM concedes that the immediate retirement would have been offered in lieu of removal.

making judicial review available for particular claims under § 7703.

718 F.2d at 399.

This holding is essential to the case, not merely the court's interpretation of § 8347(c) that all judicial review is precluded with respect to the fact of the claimant's disability. It was, however, § 8347(c) which, in *Lindahl,* gave clear meaning to the review provisions of § 8347(d). The conclusion stated in the *Lindahl* majority opinion is as follows:

> This court's grant of jurisdiction to review MSPB decisions is broad but not unlimited. Among the limitations on that grant is necessarily a statute expressly excluding review of certain decisions. Such a statute is spelled out in 5 U.S.C. § 8347(c) and (d). The government's motion to dismiss must therefore be granted.

718 F.2d at 395.

However, the discussion of § 8347(c) in *Lindahl* has created a straw on which the majority here clings to distinguish the subject appeals.

To return to the statute, 5 U.S.C. § 8347(b) provides:

> (b) . . . The Office [OPM] shall adjudicate all claims under this subchapter [5 USCS §§ 8331 *et seq.* re retirement].

With respect to review of such OPM decisions, 5 U.S.C. § 8347(d) provides:

> (d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.
>
> (2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of

> disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

The subject claims are ordinary voluntary retirement claims decided by OPM under 5 U.S.C. § 8347(b). Such claims are appealable to the board under 5 U.S.C. § 8347(d)(1). No statute specifically grants review of § 8347(d)(1) claims and the majority points to none.[1] The majority is correct in stating that the court in *Lindahl* decided only "a very specific jurisdictional issue" concerning a voluntary disability retirement claim. That type of claim happened to be before the court. However, the rationale of the decision with repsect to the construction of § 8347(d)(1) and (2) was not so limited.

In any event, by their nature, voluntary retirement claims are not appropriately reviewed under § 7703, which spells out a standard of review tailored to cases where the government is the initiator of action and bears the burden of proof, i.e., adverse action cases. That Congress chose to put *involuntary mental disability* cases into the category of adverse actions is rational, in view of the nature of the claim. The government is seeking to force the "claimant" out of service because of an alleged mental condition; the "claimant" is seeking to avoid

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[1] Compare 5 U.S.C. § 7121(f) re appeals to this court of arbitration decisions.

> The majority vaguely finds support for its exercise of jurisdiction because of adverse or disciplinary actions against appellants but does not assert that appellants' appeals to the board fall within 5 U.S.C. § 7701. Clearly they do not under precedent of this court. *Williams v. Office of Personnel Management,* 718 F.2d 1553 (Fed.Cir.1983).

forced retirement on such grounds. The parallel with an adverse action is clear.[2]

This court is not the first to have considered the jurisdictional grant of § 7703(b)(1). In *Lancellotti v. Office of Personnel Management,* 704 F.2d 91 (3rd Cir. 1983), the Third Circuit came to the conclusion that the section provided no jurisdiction to review § 8347(d)(1) claims. In the opinion of that court:

> The legislative history of the Civil Service Reform Act of 1978, P.L. 95-4154, 92 Stat. 1111, 1143, also suggests that section 7703 was enacted to provide judicial review of adverse actions initiated by agencies against employees engaged in misconduct or performing at an unacceptable level. Petitioner's claims do not fall within the scope of section 7703; we therefore reject the Board's statement of jurisdiction. [Footnote omitted.]

704 F.2d at 95-96.

Thus, the majority has created a conflict between the circuits.[3]

The majority's focus on the discussion of § 8347(c) in *Lindahl* is misplaced. § 8347(c), which says that OPM decisions on "questions" of *disability* and *dependency* are not subject to review, is jurisdictional in the sense that it places a limitation on the scope of the consent of the sovereign to suit. Cf. *Army &*

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[2] While the same is true with respect to any kind of involuntary retirement case, it is the clear prerogative of Congress to prescribe the method of and extent of review for any grant, and we have specifically denied reviewability of involuntary disability claims. *Henderson v. OPM,* 724 F.2d 119 (Fed.Cir.1983).

[3] The circuits continue to review appeals of MSPB decisions filed before the transfer of jurisdiction to this court by the Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, 96 Stat. 25. A similar conflict between circuits was noted by the Supreme Court in *Motron v. United States,* ____ U.S. ____, ____, 104 S.Ct. 2769, 2772, 81 L.Ed.2d 680 (1984) as a reason for the grant of the government's petition in that case.

Air Force Exchange Service v. Sheehan, 456 U.S. 728, 734-36, 102 S.Ct. 2118, 2122-23, 72 L.Ed.2d 520 (1982); *United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976). Even where jurisdiction over the *claim* is granted to a court,[4] the court may not review the OPM finding on the *fact* of disability or dependency. *Lancellotti,* 704 F.2d at 96-97; *Lindahl,* 718 F.2d at 393-94, 397.

A holding that there is no direct appeal to this court does not foreclose the possibility of a claim against the government which might be brought in the U.S. Claims Court under 28 U.S.C. § 1491(a)(1) or in a U.S. District Court under 28 U.S.C. § 1346(2). *See United States v. Mitchell,* 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). Whether or not § 8347(d)(2) creates an implied preclusion of suit against the government on claims under § 8347(d)(1) can wait for an appropriate case. *See Erika v. United States,* 456 U.S. 201, 102 S.Ct. 1650, 72 L.Ed.2d 12 (1982); *Lindahl,* 718 F.2d at 403-405 (Nichols, J., concurring). The *Lindahl* majority decision expressly left this issue open. 718 F.2d at 395 n. 1. What *Lindahl* held is that § 8347(d)(2) specifies the only type of § 8347 MSPB decision which may be taken by *direct* appeal to this court—namely, decisions on involuntary mental disability. To hold that appeals may also be taken from § 8347(d)(1) decisions would make § 8347(d)(2), which spells out this procedure, superfluous.

I appreciate that if jurisdiction is found to be in the Claims Court and district courts under the Tucker Act, this court would have jurisdiction over the appeal under 28 U.S.C. § 1295(a)(2) and (3). *See, Heisig v. United States,* 719 F.2d 1153 (Fed.Cir.1983). However, in those trial courts, petitioners would bear the burden of proof of their claims. *Piccone v.*

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[4] In *Lancellotti,* 704 F.2d at 97-98, the Third Circuit found jurisdiction in 28 U.S.C. § 2342(6) (Supp. IV 1980) (now repealed).

United States, 407 F.2d 866 (Ct.Cl.1969). Thus, substantive matters are involved in our decision in this case, not merely the correct procedural route of review.

The majority errs in essentially treating this court as having the same jurisdiction as the U.S. Court of Claims to which Tucker Act claims (28 U.S.C. § 1491) were brought from MSPB decisions. Prior to the 1982 amendment[5], 5 U.S.C. § 7703(b)(1) (Supp. III 1979) provided:

> Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the Court of Claims . . . as provided in chapters 91 . . . of title 28.

Whether the Court of Claims reviewed the MSPB decision directly, i.e., on cross-motions for summary judgment, or after proceedings in its trial division, was immaterial. All cases were Chapter 91 Tucker Act cases. That type of jurisdiction has not been granted to this court. *Heisig v. United States,* 719 F.2d at 1158. As Judge Smith succinctly stated in *Heisig,* "The Federal Circuit is not a renamed Court of Claims" Id. at 1157.

I would, accordingly, dismiss this appeal for lack of jursidiction and would entertain a motion to transfer the case to the U.S. Claims Court, which should be the forum to determine whether it has jurisdiction over the claim in the first instance.[6]

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[5] Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, 96 Stat. 25.

[6] I presume that the claims at this time amount to more than $10,000 so that transfer to a district court is not a viable alternative.

UNITED STATES OF AMERICA

Merit Systems Protection Board

Chicago Regional Office

IN THE MATTER OF:

WILLARD A. BRONGER

v.

OFFICE OF PERSONNEL MANAGEMENT

Decision Number:
CH08318210706

Date:
May 31, 1983

INTRODUCTION

By petition filed August 16, 1982, Willard A. Bronger appealed from the July 23, 1982 reconsideration decision of the Office of Personnel Management (OPM), Washington, D.C., which sustained its earlier disallowance of the appellant's application for early retirement from his position as an air traffic control specialist with the Department of Transportation, Federal Aviation Administration (FAA), Aurora, Illinois.

JURISDICTION

Federal employees have the right to appeal to the Merit Systems Protection Board (Board) from any action which is appealable to the Board under any law, rule or regulation. 5 U.S.C. 7701(a) (1980). Under 5 U.S.C. 8347(d) (1980), the Board has jurisdiction to hear appeals from OPM's administrative actions or orders affecting civil service retirements. OPM's regulations at 5 C.F.R. 831.110(a) (1983), provide for a direct appeal to the Board from a final OPM reconsideration decision.

ANALYSIS AND FINDINGS

Appellant applied for early retirement from the service under the provisions of 5 U.S.C. 8336(e) (1980), which states:

> An employee who is voluntarily or involuntarily separated from the service, *except by removal for cause on charges of misconduct or delinquency,* after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity. (emphasis added)

The appellant was involuntarily separated from the service by removal on September 15, 1981 on charges that he had participated in a strike against the government and for unauthorized absence. At the time of his separation, the appellant was 46 years of age and had completed 23 years, 2 months, 15 days of civilian service as an air traffic controller with the FAA, and 3 years, 9 months of military service.

On February 3, 1982, OPM disapproved the appellant's application for early retirement on the grounds that: (1) he was ineligible for benefits under 5 U.S.C. 8336(e) because he had been removed from the service for cause; and (2) he had forfeited his rights to retirement generally because he had applied for and received a refund of his retirement deductions. The disapproval was affirmed in OPM's July 23, 1982 reconsideration decision.

On appeal appellant argues that OPM's decision should be reversed because: (1) "others" against whom the FAA proposed removal for the same misconduct were permitted to retire rather than be removed; (2) OPM's refund of retirement deductions was erroneous and therefore ineffective to terminate his retirement rights; and (3) his combined civilian and military service as an air traffic controller qualifies him for early retirement under 5 U.S.C. 8336(e). In the alternative, the appellant argues that the provisions of 5 U.S.C. 8336(e), which

permit a person of 50 years of age to qualify for early retirement with only 20 years of service, unconstitutionally discriminate against him on the basis of age because they require a person under 50 years of age to accumulate 25 years of service to qualify for the same early retirement.

In response to appellant's appeal, OPM maintains that appellant's removal for cause on charges of striking and unauthorized absence specifically precludes early retirement under 5 U.S.C. 8336(e). OPM concedes, however, that if the appellant were otherwise entitled to early retirement, its refund of his retirement deductions would have been erroneous, and therefore could not defeat his right to an annuity. Furthermore, OPM states that if the appellant had not been removed for cause, he still would not qualify for early retirement under 5 U.S.C. 8336(e) because he has less than 25 years of civilian service as an air traffic controller.

In *Schapansky v. Department of Transportation,* MSPB Docket No. DA075281F1130 (October 28, 1982), the Board characterized striking against the government as "egregious conduct" which has an adverse effect upon the service and held that the penalty of removal is not clearly excessive for such conduct. Consistent with the Board's characterization and holding, I find that removal for striking and unauthorized absence qualifies as "removal for cause on charges of misconduct or delinquency" within the meaning of 5 U.S.C. 8336(e) and, therefore, as a matter of law, constitutes an absolute bar to early retirement under that statute. Accordingly, I find that OPM properly denied appellant's application for early retirement, and the decision is sustained.

Moreover, I find no merit to appellant's contention that he is entitled to early retirement, notwithstanding his removal for cause on charges of misconduct, because "others" who were charged with the same misconduct allegedly were permitted to retire instead of being removed from the service. First, the

appellant has presented absolutely no evidence in support of this allegation, since unsworn statements in an appeal petition, unless they are admissions against interest, constitute mere statements of position. *See Pelham v. Department of the Treasury,* MSPB Docket No. DA075209140 (December 4, 1981). In addition, even assuming that the allegation is true, it has no bearing on whether this appellant is entitled to early retirement since, by appellant's own statements, the "others" to whom he refers are not similarly situated since they apparently were not "remov[ed] for cause on charges of misconduct" within the meaning of 5 U.S.C. 8336(e). Therefore, the contention is dismissed.

Accordingly, having found that the appellant is not entitled to early retirement under 5 U.S.C. 8336(e) as a result of his removal from service for cause on charges of misconduct, I need not reach the other issues raised by him on appeal, since I have found that such removal for cause constitutes an absolute bar to early retirement under 5 U.S.C. 8336(e), regardless of an applicant's age[1] or his length of creditable service.[2]

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[1] Furthermore, the fact that an appellant raises a constitutional issue in connection with his appeal does not necessarily mean that the Board has jurisdiction to decide that issue. As set forth *supra,* the Board's appellate jurisdiction extends only to those actions made appealable to the Board under any law, rule, or regulation. Appellant has cited no law, rule, or regulation which gives this Board or any administrative agency the jurisdiction to decide the constitutionality of a statute enacted by Congress. Therefore, I find that, even if the issue of age discrimination were relevant to the appellant's claim for early retirement, the Board would be without jurisdiction to decide the issue of the constitutionality of 5 U.S.C. 8336(e). *Cf. Corbett v. Department of Health and Human Services,* 7 MSPB 302 (1981); *Smith v. Department of the Navy,* 4 MSPB 113 (1980).

[2] I note parenthetically, however, that the Board previously has held that service in the armed forces is not creditable for civil service retirement purposes. *See In re: Manuel T. Borbon,* 4 MSPB 230 (1980).

DECISION

The reconsideration decision is affirmed.

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on July 5, 1983 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of OPM, and the Special Counsel may file a petition for review. The Director may request review only if he is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office of Personnel Management. The Board may grant a petition for review, after providing an opportunity for response by other parties, when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N. W., Washington, D. C. 20419, no later than the date cited above. Three copies of the petition must be filed with the Secretary.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final decision on the issue of discrimination, *either when this decision becomes final on the date set forth above or after final Board action when appellant has petitioned the Board for review or the Board has reopened the case on its own motion.* The appellant may file a civil action in court *without either petitioning the*

EEOC or the Board or after either body has rendered a final administrative decision. Either a petition *or* a civil action may be filed, *but not both,* no later than 30 days after the Board's decision has become final. Appellants who choose to file an action in a district court also have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs or security be waived.

Except for actions filed under the antidiscrimination laws, pursuant to 5 U.S.C. Section 7703(b)(1), (as modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295 (a)(9)) the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

/s/ MARY L. SEBEK
Mary L. Sebek
Presiding Official

UNITED STATES OF AMERICA

Merit Systems Protection Board

Chicago Regional Office

IN THE MATTER OF:

FRANK E. KACPROWICZ

v.

OFFICE OF PERSONNEL MANAGEMENT

Decision Number:
CH08318210711

Date:
May 31, 1983

INTRODUCTION

By petition filed August 19, 1982, Frank E. Kacprowicz appealed from the July 29, 1982 reconsideration decision of the Office of Personnel Management (OPM), Washington, D. C., which sustained its earlier disallowance of the appellant's application for early retirement from his position as an air traffic control specialist with the Department of Transportation, Federal Aviation Administration (FAA), Aurora, Illinois.

JURISDICTION

Federal employees have the right to appeal to the Merit Systems Protection Board (Board) from any action which is appealable to the Board under any law, rule or regulation. 5 U.S.C. 7701(a) (1980). Under 5 U.S.C. 8347(d) (1980), the Board has jurisdiction to hear appeals from OPM's administrative actions or orders affecting civil service retirements. OPM's regulations at 5 C.F.R. 831.110(a) (1983), provide for a direct appeal to the Board from a final OPM reconsideration decision.

ANALYSIS AND FINDINGS

By letter dated December 21, 1981, appellant applied for early retirement from the service under the provisions of 5 U.S.C. 8336(e) (1980), which states:

> An employee who is voluntarily or involuntarily separated from the service, *except by removal for cause on charges of misconduct or delinquency,* after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity. (emphasis added)

The appellant was involuntarily separated from the service by removal on September 2, 1981 on charges that he had participated in a strike against the government and for unauthorized absence. At the time of his separation, the appellant was 44 years of age and had completed 22 years, 10 months, 25 days of civilian service as an air traffic controller with the FAA, and 3 years, 10 months, 1 day of military service. Appellant's December 21, 1981 application for early retirement stated that his military service included 3 years, 8 months as an air traffic controller.

On January 11, 1982, OPM disapproved the appellant's application for early retirement on the grounds that: (1) he was ineligible for benefits under 5 U.S.C. 8336(e) because he had been removed from the service for cause; and (2) he had forfeited his rights to retirement generally because he had applied for and received a refund of his retirement deductions. The disapproval was affirmed in OPM's July 29, 1982 reconsideration decision.

On appeal appellant argues that OPM's decision should be reversed because: (1) "others" against whom the FAA proposed removal for the same misconduct were permitted to retire rather than be removed; (2) OPM's refund of retirement deductions was erroneous and therefore ineffective to terminate

his retirement rights; and (3) his combined civilian and military service as an air traffic controller qualifies him for early retirement under 5 U.S.C. 8336(e). In the alternative, the appellant argues that the provisions of 5 U.S.C. 8336(e), which permit a person of 50 years of age to qualify for early retirement with only 20 years of service, unconstitutionally discriminate against him on the basis of age because they require a person under 50 years of age to accumulate 25 years of service to qualify for the same early retirement.

In response to appellant's appeal, OPM maintains that appellant's removal for cause on charges of striking and unauthorized absence specifically precludes early retirement under 5 U.S.C. 8336(e). OPM concedes, however, that if the appellant were otherwise entitled to early retirement, its refund of his retirement deductions would have been erroneous, and therefore could not defeat his right to an annuity. Furthermore, OPM states that if the appellant had not been removed for cause, he still would not qualify for early retirement under 5 U.S.C. 8336(e) because he has less than 25 years of civilian service as an air traffic controller.

In *Schapansky v. Department of Transportation,* MSPB Docket No. DA075281F1130 (October 28, 1982), the Board characterized striking against the government as "egregious conduct" which has an adverse effect upon the service and held that the penalty of removal is not clearly excessive for such conduct. Consistent with the Board's characterization and holding, I find that removal for striking and unauthorized absence qualifies as "removal for cause on charges of misconduct or delinquency" within the meaning of 5 U.S.C. 8336(e) and, therefore, as a matter of law, constitutes an absolute bar to early retirement under that statute. Accordingly, I find that OPM properly denied appellant's application for early retirement, and the decision is sustained.

Moreover, I find no merit to appellant's contention that he is entitled to early retirement, notwithstanding his removal for cause, because "others" who were charged with the same

misconduct allegedly were permitted to retire instead of being removed from the service. First, the appellant has presented absolutely no evidence in support of this allegation, since unsworn statements in an appeal petition, unless they are admissions against interest, constitute mere statements of position. *See Pelham v. Department of the Treasury,* MSPB Docket No. DA075209140 (December 4, 1981). In addition, even assuming that the allegation is true, it has no bearing whatsoever on whether this appellant is entitled to early retirement since, by appellant's own statements, the "others" to whom he refers are not similarly situated since they apparently were never "remov[ed] for cause on charges of misconduct" within the meaning of 5 U.S.C. 8336(e). Therefore, the contention is dismissed.

Accordingly, having found that the appellant is not entitled to early retirement under 5 U.S.C. 8336(e) as a result of his removal from the service for cause on charges of misconduct, I need not reach the other issues raised by him on appeal, since I have found that removal for cause constitutes an absolute bar to early retirement under 5 U.S.C. 8336(e), regardless of an applicant's age[1] or his length of creditable service.[2]

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[1] Furthermore, the fact that an appellant raises a constitutional issue in connection with his appeal does not necessarily mean that the Board has jurisdiction to decide that issue. As set forth *supra,* the Board's appellate jurisdiction extends only to those actions made appealable to the Board under any law, rule, or regulation. Appellant has cited no law, rule, or regulation which gives this Board or any administrative agency the jurisdiction to decide the constitutionality of a statute enacted by Congress. Therefore, I find that, even if the issue of age discrimination were relevant to the appellant's claim for early retirement, the Board would be without jurisdiction to review the appellant's challenge to the constitutionality of 5 U.S.C. 8336(e). *Cf. Corbett v. Department of Health and Human Services,* 7 MSPB 302 (1981); *Smith v. Department of the Navy,* 4 MSPB 113 (1980).

[2] I note parenthetically, however, that the Board previously has held that service in the armed forces is not

(Footnote continued on following page.)

DECISION

The reconsideration decision is affirmed.

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on July 05, 1983 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of OPM, and the Special Counsel may file a petition for review. The Director may request review only if he is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office of Personnel Management. The Board may grant a petition for review, after providing an opportunity for response by other parties, when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N. W., Washington, D. C. 20419, no later than the date cited above. Three copies of the petition must be filed with the Secretary.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final

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(Footnote continued from preceding page.)

creditable for civil service retirement purposes. *See In re: Manuel T. Borbon,* 4 MSPB 230 (1980).

decision on the issue of discrimination, *either when this decision becomes final on the date set forth above or after final Board action when appellant has petitioned the Board for review or the Board has reopened the case on its own motion.* The appellant may file a civil action in court *without either petitioning the EEOC or the Board or after either body has rendered a final administrative decision.* Either a petition *or* a civil action may be filed, *but not both,* no later than 30 days after the Board's decision has become final. Appellants who choose to file an action in a district court also have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs or security be waived.

Except for actions filed under the antidiscrimination laws, pursuant to 5 U.S.C. Section 7703(b)(1), (as modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295(a)(9)) the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D. C. 20439, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

/s/ MARY L. SEBEK
Mary L. Sebek
Presiding Official

UNITED STATES OF AMERICA

Merit Systems Protection Board

Chicago Regional Office

IN THE MATTER OF:

ALBERT J. VEVERKA

v.

OFFICE OF PERSONNEL MANAGEMENT

Decision Number:
CH08318210563

Date:
May 31, 1983

INTRODUCTION

By petition filed May 29, 1982, Mr. Albert J. Ververka appealed from the the May 12, 1982 reconsideration decision of the Office of Pesonnel Management (OPM), Washington, D. C. This sustained OPM's earlier disallowance of the appeallant's application for early retirement from his position as an air traffic control specialist with the Department of Transportation, Federal Aviation Administration (FAA), Aurora, Illinois.

JURISDICTION

Federal employees have the right to appeal to the Merit Systems Protection Board (Board) from any action which is appealable to the Board under any law, rule or regulation. 5 U.S.C. 7701(a) (1980). Under 5 U.S.C. 8347(d) (1980), the Board has jurisdiction to hear appeals from OPM's administrative actions or orders affecting civil service retirements. OPM's regulations at 5 C.F.R. 831.110(a) (1983), provide for a direct appeal to the Board from a final OPM reconsideration decision.

ANALYSIS AND FINDINGS

The appellant applied for early retirement under the provisions of 5 U.S.C. 8336(e) (1980), which states:

> an employee who is voluntarily or involuntarily separated from the service, *except by removal for cause on charges of misconduct or delinquency,* after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity.

(Emphasis added). The appellant was involuntarily separated from the service by removal on September 9, 1981 for striking against the government and for unauthorized absence. At the time of his separation, the appellant was 44 years of age and had completed 23 years, 8 months, 4 days of civilian service as an air traffic controller with the FAA, and 3 years, 2 months and 8 days of military service.

On January 13, 1982, OPM disapproved the appellant's application for early retirement on the grounds that: (1) he was ineligible for benefits under 5 U.S.C. 8336(e) because he had been removed from the service for cause; and (2) he had forfeited his rights to retirement generally because he had applied for and received a refund of his retirement deductions. The disapproval was affirmed in OPM's May 12, 1982 reconsideration decision.

On appeal, the appellant argues that OPM's decision should be reversed because: (1) "others" against whom the FAA proposed removal for the same misconduct were permitted to retire rather than be removed; (2) OPM's refund of retirement deductions was erroneous and therefore ineffective to terminate his retirement rights; and (3) his combined civilian and military service as an air traffic controller qualifies him for early retirement under 5 U.S.C. 8336(e). In the alternative, the appellant argues that the provisions of 5 U.S.C. 8336(e), which permit a person of 50 years of age to qualify for early

retirement with only 20 years of service, unconstitutionally discriminate against him on the basis of age because they require a person under 50 years of age to accumulate 25 years of service to qualify for the same early retirement.

In *Schapansky v. Department of Transportation,* MSPB Docket No. DA075281F1130 (October 28, 1982), the Board characterized striking against the government as "egregious conduct" which has an adverse effect upon the service and held that the penalty of removal is not clearly excessive for such conduct. Consistent with the Board's characterization and holding, I find that removal for striking and unauthorized absence qualifies as "removal for cause on charges of misconduct or delinquency" within the meaning of 5 U.S.C. 8336(e) and, therefore, as a matter of law, constitutes an absolute bar to early retirement under that statute. Accordingly, I find that OPM properly denied appellant's application for early retirement, and the decision is sustained.

I find no merit to appellant's contention that he is entitled to early retirement, notwithstanding his removal for cause on charges of misconduct, because "others" who were charged with the same misconduct allegedly were permitted to retire instead of being removed from the service. Assuming that the allegation is true, it has no bearing on whether this appellant is entitled to early retirement since, by appellant's own statements, the "others" to whom he refers are not similarly situated because they apparently were not "remov[ed] for cause on charges of misconduct" within the meaning of 5 U.S.C. 8336(e). Therefore, the contention is dismissed.

Having found that the appellant is not entitled to early retirement under 5 U.S.C. 8336(e) as a result of his removal from service for cause on charges of misconduct, I need not reach the other issues raised by him on appeal. Such removal for cause constitutes an absolute bar to early retirement under 5

U.S.C. 8336(e), regardless of an applicant's length of creditable service or his age.[1]

DECISION

The reconsideration decision is affirmed. This is an initial decision. It will become a final decision of the Merit Systems Protection Board on July 5, 1983 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of OPM, and the Special Counsel may file a petition for review. The Director may request review only if he is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office of Personnel Management. The Board may grant a petition for review, after providing an opportunity for response by other parties, when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

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[1] The fact that an appellant raises a constitutional issue in connection with his appeal does not necessarily mean that the Board has jurisdiction to decide that issue. As set forth *supra*, the Board's appellate jurisdiction extends only to those actions made appealable to the Board under any law, rule, or regulation. The appellant has cited no law, rule, or regulation which gives this Board or any administrative agency the jurisdiction to decide the constitutionality of a statute enacted by Congress. Therefore, even if the issue of age discrimination were relevant to the appellant's claim for early retirement, the Board would be without jurisdiction to decide the issue of the constitutionality of 5 U.S.C. 8336(e). *Cf. Corbett v. Department of Health and Human Services*, 7 MSPB 302 (1981); *Smith v. Department of the Navy*, 4 MSPB 113 (1980).

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, no later than the date cited above. Three copies of the petition must be filed with the Secretary.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final decision on the issue of discrimination, *either when this decision becomes final on the date set forth above or after final Board action when appellant has petitioned the Board for review or the Board has reopened the case on its own motion.* The appellant may file a civil action in court *without either petitioning the EEOC or the Board or after either body has rendered a final administrative decision.* Either a petition *or* a civil action may be filed, *but not both,* no later than 30 days after the Board's decision has become final. Appellants who choose to file an action in a district court also have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs or security be waived.

Except for actions filed under the antidiscrimination laws, pursuant to 5 U.S.C. Section 7703(b)(1), (as modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295(a)(9)) the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

/s/ JULIA P. GRIP
Julia P. Grip
Presiding Official

UNITED STATES
Office of Personnel Management

JULY 23 1982

CRR:RW:ew CSA 2 496 240

Mr. Willard A. Bronger
1 S. 604 Winfield Road
Wheaton, IL 60187

Dear Mr. Bronger:

This is in reply to your request for reconsideration of the February 3, 1982 decision that you are not entitled to benefits under the Civil Service Retirement System because you received a refund of your retirement contributions.

Section 8342(a) of title 5, U.S. Code provides in pertinent part:

> "An employee or Member who is separated from the service, or is transferred to a position in which he does not continue subject to this subchapter, is entitled to be paid the lump-sum credit if his separation or transfer occurs and application for payment is filed with the Office of Personnel Management at least 31 days before the earliest commencing date of any annuity for which he is eligible. The receipt of payment of the lump sum credit by the individual voids all annuity rights under this subchapter, until he is reemployed in the service subject to this subchapter. . ."

At the time of your separation from Federal service on September 15, 1981, our records show that you applied for and were paid a refund of the deductions credited to your account in the retirement fund. You applied for the refund by executing Standard Form 2802, and a check for $30,622.21 was authorized for payment on December 16, 1981. For your information, we have enclosed a copy of your refund application along with your retirement records which verifies the above information.

Therefore, by accepting the refund, you ended your rights under the Civil Service Retirement System.

We note your contention that you were not advised of your retirement eligibility prior to or during your removal. However, information on the Application for Refund of Retirement Deductions clearly states that by receiving a refund you forfeited future annuity rights unless you are later reemployed subject to the Civil Service Retirement law. Therefore, the application for refund, which you signed, explained the ramifications of requesting a refund and adequately informed you of the consequences of your act and the affect of receipt of a refund on any future annuity rights.

We must assume that any person who executes a refund application has carefully read the form and considered the matter and therefore understands the effects of his actions.

In reference to Section 8336(e) of title 5, U.S. Code, referred to in your letter, which states:

> "An employee who is voluntarily or involuntarily separated from the service, *except by removal for cause* on charges of misconduct or delinquency, after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity." (Emphasis added)

Because you were involuntarily separated for cause, if you had not withdrawn your retirement contributions, your earliest date of entitlement to annuity benefits would have been a deferred annuity at age 62.

In view of the above, the decision of February 3, 1982 is affirmed. This constitutes the final reconsideration decision of the Office of Personnel Management on this matter. You have the right to appeal this decision to the Merit Systems Protection

Board. The enclosed sheet provides instructions on how to file an appeal. A copy of MSPS's regulations is also enclosed.

Sincerely yours,

/s/ EC 7-23-82
Michael J. Barrett, *Chief*
Reconsideration Staff
Compensation Group

Enclosures

CRR:RWilliams:ew 7-7-82 B-29-B-30
R. Williams 7-22-82

UNITED STATES

Office of Personnel Management

Washington, D.C. 20415

JULY 29, 1982

In Reply Refer To: CRR:LL:ew
Your Reference: CSA 2 493 107

Mr. Frank E. Kacprowicz
38 W 530 Lake Charlotte Ct.
St. Charles, IL 60174

Dear Mr. Kacprowicz:

This is in reply to your request for reconsideration of the January 13, 1982 decision that you are not entitled to an annuity under the U.S. Civil Service Retirement System.

Section 8342(a) of title 5, United States Code, provides for the refund of civil service retirement deductions in pertinent part, as follows:

> "An employee . . . who is separated from the service . . . is entitled to be paid the lump-sum credit if his separation . . . occurs and application for payment is filed with the Office of Personnel Management (formerly the Civil Service Commission) at least 31 days before the earliest commencing date of any annuity for which he is eligible. *The receipt of payment of the lump-sum . . . voids all annuity rights under this subchapter, until he is reemployed in the service subject to this subchapter. . . .*" (Emphasis added.)

In conjunction with this provision section 8334(d) *limits the opportunity to redeposit a prior refund to currently covered employees,* by providing, in pertinent part:

> "Each *employee* . . . who has received a refund of retirement deductions under this . . . system . . . for which he

may be allowed credit under this subchapter may deposit the amount received with interest. Credit may not be allowed for the service covered by the refund until the deposit is made." (Emphasis added.)

We have carefully reviewed your case. The record shows that you were employed on October 8, 1958 as an Air Traffic Control Specialist with the Federal Aviation Administration. You held this position until September 2, 1981 at which time you were "Removed". You applied for and received a refund of your Civil Service Retirement contributions in the amount of $29,820.82 on November 18, 1981.

On the face of the Standard Form 2803 you used to apply for the refund the following information was prominently displayed:

"If you have more than 5 years of service you may be entitled to annuity rights which will be forfeited by payment of this refund unless you are later reemployed."

You were never reemployed (in a position covered by the Civil Service Retirement Act or otherwise) after your separation on September 2, 1981 and the subsequent payment of a refund of your retirement deductions to you on November 18, 1981. Therefore, no new annuity right was ever established.

Section 8336(e) of title 5, United States Code provides:

"An employee who is voluntarily or involuntarily separated from the service, *except by removal for cause* on charges of misconduct or delinquency, after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity."

Inasmuch as your separation from Federal service was "Removal for cause" you are not entitled to an immediate annuity.

In view of the above the decision is affirmed. This constitutes the final reconsideration decision of the Office of Personnel Management on this matter. You have the right to appeal this decision to the Merit Systems Protection Board. The enclosed sheet provides instructions on how to file an appeal. A copy of MSPB's regulations is also enclosed.

Sincerely yours,
/s/
Michael J. Barrett
Chief Reconsideration Staff
Compensation Group

Enclosure

UNITED STATES

Office of Personnel Management

Washington, D.C. 20415

MAY 12, 1982

In Reply Refer To: CRR:KB:ew
Your Reference: CSA 2 493 530

Mr. Albert J. Veverka
Rt. 1, Box 25
Sublette, IL 61367

Dear Mr. Veverka:

This is in reply to your request for reconsideration of the January 13, 1982 decision that you are not entitled to Civil Service Retirement benefits.

According to the Civil Service Retirement law an employee is eligible for annuity benefits after completing 25 years of service as an air traffic controller or after becoming age 50 and completing 20 years of service as an air traffic controller. Our records indicate that at the time of your separation from service on September 9, 1981, you were 44 years of age and had completed 23 years, 8 months of service (January 6, 1958 to September 9, 1981) as an air traffic controller. Therefore, you do not meet the age and length of service requirements for immediate retirement.

Had you met the age and length of service requirements for an immediate annuity, your removal from Federal service ended any rights you may have had to an immediate annuity. Title 5, U.S. Code, Section 8336(e) provides the following:

"An employee who is voluntarily or involuntarily separated from the service, *except by removal for cause on charges of*

> *misconduct or delinquency,* after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity." *(Emphasis added)*

Although you were not entitled to an immediate annuity, you would have been eligible for deferred annuity benefits at age 62. However, the refund you received of your retirement deductions ended your rights to deferred annuity benefits. You were advised on your Application for Refund of Retirement Deductions that:

> "If you have more than 5 years of service you may be entitled to annuity rights which will be forfeited by payment of this refund unless you are later reemployed subject to the Civil Service Retirement Law."

You indicate that you were not informed of your rights or properly counseled in this matter. This, however, does not act to afford you relief to which you are not otherwise entitled by law or regulations.

The responsibility to advise and counsel employees on present and future retirement rights belongs to the employing agency. The Office of Personnel Management makes every effort to disseminate pertinent information for the use of the various agencies in their performance of this function. An agency's error in interpreting or transmitting such information to an employee, or its failure to do so, does not operate to create any rights for the employee which were not otherwise provided for by law. The Comptroller General of the United States in a previous decision (4 CG 773) has stated as follows:

> "A statute can not be set aside by 'inadvertence' and legal rights can not be created by the error of administrative officers."

In view of the above, we must affirm the earlier decision of January 13, 1982. This constitutes the final decision of the Office of Personnel Management on this matter. You have the

right to appeal this decision to the Merit Systems Protection Board (MSPB). The enclosed sheet provides instructions on how to file an appeal. A copy of MSPB's regulations is also enclosed.

We regret the facts in your case do not permit a more favorable reply.

Sincerely yours,

/s/ J. PANAGAKOS, Supv.
Michael J. Barrett, *Chief*
for Reconsideration Staff
Compensation Group

Enclosure

UNITED STATES
Office of Personnel Management
Retirement and Insurance Programs
Washington, D.C. 20415

2-3-82

Willard A. Bronger
1S604 Winfield Rd.
Wheaton, IL 60187

CSA-2 496 240
322-26-0230

01/22/35-6F
Batch: 019899

RETIREMENT APPLICATION DENIED

Your Civil Service Retirement Application is denied for the reason(s) checked:

☐ You do not have the minimum five years of creditable service.

☐ Your Federal employment was not under the Civil Service Retirement System.

☒ When you left Federal service, you applied and were paid a refund of your retirement deduction plus any interest. Under the Law, the refund ended your retirement rights.

Refunded to you	Date Paid
$30622.21	12-16-81

☐ By law, your annuity cannot begin until you are 62. About 60 days before you become age 62, write us for a new retirement application

☐ You can get a refund of your retirement deductions (plus any earned interest) by returning the enclosed application.

☒ The reason shown for the termination of your Federal Service is Removal. This reason terminates any rights for an early retirement.

RETIREMENT CLAIMS DIVISION
BRI 46-74A
March 1980

UNITED STATES
Office of Personnel Management
Retirement and Insurance Programs
Washington, D.C. 20415

1-13-82

Frank E. Kacprowicz
38 W. 530 Lk Charlotte
St. Charles, IL 60174

CSA-2 493 107
336-30-8104

04/04/37-6F
Batch: 365899

RETIREMENT APPLICATION DENIED

Your Civil Service Retirement Application is denied for the reason(s) checked:

☐ You do not have the minimum five years of creditable service.

☐ Your Federal employment was not under the Civil Service Retirement System.

☒ When you left Federal service, you applied and were paid a refund of your retirement deduction plus any interest. Under the Law, the refund ended your retirement rights.

Refunded to You	Date Paid
$29820.82	11-18-81

☐ By law, your annuity cannot begin until you are 62. About 60 days before you become age 62, write us for a new retirement application.

☐ You can get a refund of your retirement deductions (plus any earned interest) by returning the enclosed application.

☒ Since your job ended because of a removal, this terminated your eligibility for early retirement.

RETIREMENT CLAIMS DIVISION
BRI 46-74A
March 1980

UNITED STATES
Office of Personnel Management
Retirement and Insurance Programs
Washington, D.C. 20415

1-13-82

Albert J. Veverka
RR 1 BX 25
Sublette IL 61367

CSA-2 493 530
318-30-1731

01/09/37-6F
Batch: 004899

RETIREMENT APPLICATION DENIED

Your Civil Service Retirement Application is denied for the reason(s) checked:

☐ You do not have the minimum five years of creditable service.

☐ Your Federal employment was not under the Civil Service Retirement System.

☒ When you left Federal service, you applied and were paid a refund of your retirement deduction plus any interest. Under the Law, the refund ended your retirement rights.

Refunded To You	Date Paid
$31,594.86	12-3-81

☐ By law, your annuity cannot begin until you are 62. About 60 days before you become age 62, write us for a new retirement application.

☐ You can get a refund of your retirement deductions (plus any earned interest) by returning the enclosed application.

☒ Since your job ended because of a removal, this terminated your eligibility for early retirement.

RETIREMENT CLAIMS DIVISION
BRI 46-74A
March 1980

UNITED STATES COURT OF APPEALS

For the Federal Circuit

WILLARD A. BRONGER,
Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

No. 83-1349
CH0831821076

FRANK E. KACPROWICZ,
Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

No. 83-1350
CH08318210711

ALBERT J. VEVERKA,
Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

No. 83-1376
CH08318210563

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: Decision of the Merit Systems Protection Board upholding OPM's denial of each of petitioners' claims to early retirement benefits AFFIRMED; panel holding of July 26, 1984 (740 F.2d 1552) is REVERSED.

Dated August 1, 1985

ENTERED BY ORDER OF THE COURT
George E. Hutchinson, Clerk

/s/ GEORGE E. HUTCHINSON
Clerk

ISSUED AS A MANDATE: August 12, 1985
Bill of costs filed by Petitioners on August 9, 1984;
DENIED, August 1, 1985
COSTS: Against, Petitioners
PRINTING----------$122.56
TOTAL----------$122.56

5 U.S.C.:

§ 2101. Civil service; armed forces; uniformed services

For the purpose of this title [5 USCS §§ 101 et seq.]—

(1) the "civil service" consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services;

(2) "armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard; and

(3) "uniformed services" means the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

* * * *

§ 2105. Employee

(a) For the purpose of this title [5 USCS §§ 101 et seq.], "employee," except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—

(1) appointed in the civil service by one of the following acting in an official capacity—

(A) the President;

(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32 [32 USCS § 709(c)];

(2)engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

* * * *

§ 2109. Air traffic controller; Secretary

For the purpose of this title [5 USCS §§ 101 et seq.]—

(1) "air traffic controller" or "controller" means an employee of the Department of Transportation or the Department of Defense who, as determined under regulations prescribed by the Secretary, is actively engaged in the separation and control of air traffic, or is the immediate supervisor of an employee actively engaged in the separation and control of air traffic, in an air traffic control facility; and

(2) "Secretary", when used in connection with "air traffic controller" or "controller", means the Secretary of Transportation with respect to controllers in the Department of Transportation, and the Secretary of Defense with respect to controllers in the Department of Defense.

§ 3307. Competitive service; maximum-age entrance requirements; exceptions

(a) Except as provided in subsections (b), (c), and (d) of this section, appropriated funds may not be used to pay an employee who establishes a maximum-age requirement for entrance into the competitive service.

(b) The Secretary may, with the concurrence of such agent as the President may designate, determine and fix the maximum limit of age within which an original appointment to a position as an air traffic controller may be made.

* * * *

§ 8331. Definitions

For the purpose of this subchapter [5 USCS §§ 8331 et seq.]

(1) "employee" means—

(A) an employee as defined by section 2105 of this title [5 USCS § 2105];

(B) the Architect of the Capitol, an employee of the Architect of the Capitol, and an employee of the Botanic Garden;

(C) a congressional employee as defined by section 2107 of this title [5 USCS § 2107] (other than the Architect of the Capitol, an employee of the Architect of the Capitol, and an employee of the Botanic Garden), after he gives notice in writing to the official by whom he is paid of his desire to become subject to this subchapter;

(D) a temporary Congressional employee appointed at an annual rate of pay, after he gives notice in writing to the official by whom he is paid of his desire to become subject to this subchapter [5 USCS §§ 8331 et seq.];

(E) a United States Commissioner whose total pay for services performed as Commissioner is not less than $3,000 in each of the last 3 consecutive calendar years ending after December 31, 1954;

(F) an individual employed by a county committee established under section 590h(b) of title 16 [16 USCS § 590h(b);

(G) an individual employed by the government of the District of Columbia;

(H) an individual employed by Gallaudet College;

(I) an individual appointed to a position on the office staff of a former President under section 1(b) of the Act of August 25, 1958 (72 Stat. 838 [3 USCS § 102 note]); and

(J) an alien (i) who was previously employed by the Government, (ii) who is employed full time by a foreign government for the purpose of protecting or furthering the interests of the United States during an interruption of diplomatic or consular relations, and (iii) for whose services reimbursement is made to the foreign government by the United States;

but does not include—

(i) a justice or judge of the United States as defined by section 451 of title 28 [28 USCS § 451];

(ii) an employee subject to another retirement system for Government employees;

(iii) an employee or group of employees in or under an Executive agency excluded by the Office of Personnel Management under section 8347(g) of this title [5 USCS § 8347(g)];

(iv) an individual or group of individuals employed by the government of the District of Columbia excluded by the Office under section 8347(h) of this title [5 USCS § 8347(h)];

(v) a temporary employee of the Administrative Office of the United States Courts or of a court named by section 610 of title 28 [28 USCS § 610];

(vi) a construction employee or other temporary, parttime, or intermittent employee of the Tennessee Valley Authority;

(vii) an employee under the Office of the Architect of the Capitol excluded by the Architect of the Capitol under section 8347(i) of this title [5 USCS § 8347(i)];

(viii) an employee under the Library of Congress excluded by the Librarian of Congress under section 8347(j) of this title [5 USCS § 8347(j)]; or

(ix) a student-employee as defined by section 5351 of this title [5 USCS § 5351].

* * * *

(12) "service" means employment creditable under section 8332 of this title [5 USCS § 8332];

(13) "military service" means honorable active service—

(A) in the armed forces;

(B) in the Regular or Reserve Corps of the Public Health Service after June 30, 1960; or

(C) as a commissioned officer of the Environmental Science Services Administration after June 30, 1961;

but does not include service in the National Guard except when ordered to active duty in the service of the United States;

* * * *

§ 8332. Creditable service

* * * *

(c)(1) Except as provided in paragraph (2) of this subsection and subsection (d) of this section—

(A) the service of an individual who first becomes an employee or Member before October 1, 1982, shall include credit for each period of military service performed before the date of the separation on which the entitlement to an annuity under this subchapter [5 USCS §§ 8331 et seq.] is based, subject to section 8332(j) of this title [subsec. (j) of this section]; and

(B) the service of an individual who first becomes an employee or Member on or after October 1, 1982, shall include credit for—

(i) each period of military service performed before January 1, 1957, and

(ii) each period of military service performed after December 31, 1956, and before the separation on which the entitlement to annuity under this subchapter [5 USCS §§ 8331 et seq.] is based, only if a deposit (with interest, if any) is made with respect to that period as provided in section 8334(j) of this title [5 USCS § 8334(j)].

(2) If an employee or Member is awarded retired pay based on any period of military service, the service of the employee or Member may not include credit for such

period of military service unless the retired pay is awarded—

(A) based on a service-connected disability—

(i) incurred in combat with an enemy of the United States; or

(ii) caused by an instrumentality of war and incurred in line of duty during a period of war as defined by section 301 of title 38 [38 USCS § 301]; or

(B) under chapter 67 of title 10 [10 USCS §§ 1331 et seq.].

(d) For the purpose of section 8339(c)(1) of this title [5 USCS § 8339(c)(1)], a Member—

(1) shall be allowed credit only for periods of military service not exceeding 5 years, plus military service performed by the Member on leaving his office, for the purpose of performing military service, during a war or national emergency proclaimed by the President or declared by Congress and before final separation from service as Member; and

(2) may not receive credit for military service for which credit is allowed for purpose of retired pay under other statute.

* * * *

§ 8333. Eligibility for annuity

(a) An employee must complete at least 5 years of civilian service before he is eligible for an annuity under this subchapter [5 USCS §§ 8331 et seq.].

(b) An employee or Member must complete, within the last 2 years before any separation from service, except a separation because of death or disability, at least 1 year of creditable civilian service during which he is subject to this subchapter [5 USCS §§ 8331 et seq.]. before he or his survivors are eligible for annuity under this subchapter [5 USCS §§ 8331 et seq.]. based on the separation. If an

employee or Member, except an employee or Member separated from the service because of death or disability, fails to meet the service requirement of the preceding sentence, the amounts deducted from his pay during the service for which no eligibility for annuity is established based on the separation shall be returned to him on the separation. Failure to meet this service requirement does not deprive the individual or his survivors of annuity rights which attached on a previous separation.

* * * *

§ 8336. Immediate retirement

* * * *

(e) An employee who is voluntarily or involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity.

* * * *

28 U.S.C.:

§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

* * * *

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5 [5 USCS § 7703(b)(1), (d)]; and

* * * *